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U.S. HOUSE OF REPRESENTATIVES

PERMANENT SELECT COMMITTEE

ON INTELLIGENCE

WASHINGTON, DC 20515

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March 12, 1986

Honorable William J. Casey
Director of Central Intelligence
Washington, D.C. 20505

OS REGISTRY
FILE HSE-HR3963

Dear Mr. Casey:

The bill H.R. 3963, "Defense Intelligence Commercial Entities Act," introduced by Congressman G. William Whitehurst, has been referred to this Committee. The Committee would appreciate receiving your views on H.R. 3963.

With best wishes, I am

Sincerely yours,

Lee H. Hamilton
Lee H. Hamilton
Chairman

Enclosures: H.R. 3963
Section-by-Section Analysis

OS REGISTRY

Ja

99TH CONGRESS
1ST SESSION

H. R. 3963

To provide authority to the Secretary of Defense to establish and operate commercial entities to provide cover for Department of Defense foreign intelligence collection activities, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

DECEMBER 16, 1985

Mr. WHITEHURST introduced the following bill; which was referred to the Committees on Armed Services and the Permanent Select Committee on Intelligence

A BILL

To provide authority to the Secretary of Defense to establish and operate commercial entities to provide cover for Department of Defense foreign intelligence collection activities, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*
3 That this Act may be cited as the "Defense Intelligence
4 Commercial Entities Act".

5 SEC. 2. (a) Subtitle A of title 10, United States Code is
6 amended by adding at the end of part I the following new
7 chapter:

1 **"CHAPTER 19—DEPARTMENT OF DEFENSE**
 2 **INTELLIGENCE COMMERCIAL ENTITIES**

"Sec.

"391. Authority for intelligence commercial entities.

"392. Administrative support for intelligence commercial entities.

"393. Use and disposition of funds.

"394. Use of prevailing commercial practices.

"395. Limitations on activities of intelligence commercial entities.

"396. Executive branch oversight, accountability, and coordination.

"397. Relationship to laws of the several States.

"398. Delegation of authority.

"399. Definitions.

3 **"§ 391. Authority for intelligence commercial entities**

4 "(a)(1) The Secretary of Defense, with the concurrence
 5 of the Attorney General and the Director of Central Intelli-
 6 gence, may authorize, for a period not to exceed two years,
 7 the establishment and operation in accordance with the provi-
 8 sions of this chapter of a commercial entity to provide cover
 9 for foreign intelligence collection activities of the Department
 10 of Defense, if the Secretary certifies in writing that establish-
 11 ment and operation of such entity is essential to the conduct
 12 of an authorized foreign intelligence collection activity of the
 13 Department of Defense.

14 "(2) With the same concurrences and certification re-
 15 quired by paragraph (1) for the initial authorization under
 16 that paragraph for establishment and operation of a commer-
 17 cial entity to provide cover for foreign intelligence collection
 18 activities of the Department of Defense, the Secretary of De-
 19 fense may renew authorization to operate such entity in ac-

1 cordance with the provisions of this chapter for additional
2 periods of not to exceed two years each.

3 “(b) The Secretary of Defense may terminate a com-
4 mercial entity authorized under subsection (a) at any time.

5 **“§ 392. Administrative support for intelligence commercial**
6 **entities**

7 “The Secretary of Defense is authorized to acquire, use
8 and dispose of goods, services, real property, personal prop-
9 erty, intangible property, buildings, facilities, space, insur-
10 ance, licenses, and supplies to establish, operate, and termi-
11 nate a commercial entity authorized under section 391 of this
12 title.

13 **“§ 393. Use and disposition of funds**

14 “(a) The Secretary of Defense may deposit in, and with-
15 draw from, banks and other financial institutions—

16 “(1) funds appropriated to the Department of De-
17 fense that are used to establish, operate or terminate a
18 commercial entity authorized under section 391 of this
19 title; and

20 “(2) funds generated by a commercial entity au-
21 thorized under section 391 of this title.

22 “(b) Funds generated by a commercial entity authorized
23 under section 391 of this title may be used to offset necessary
24 and reasonable expenses incurred by that entity.

1 “(c) Funds generated by a commercial entity authorized
2 under section 391 that are no longer necessary for the con-
3 duct of the activities of that entity shall be deposited in the
4 Treasury of the United States as miscellaneous receipts as
5 soon as practicable.

6 “(d) Upon the termination of a commercial entity estab-
7 lished under section 391 of this title, the proceeds therefrom,
8 after all obligations are met, shall be deposited in the Treas-
9 ury of the United States as miscellaneous receipts.

10 “§ 394. Use of prevailing commercial practices

11 “The establishment, operation, and termination of a
12 commercial entity authorized under section 391 of this title,
13 any acquisition, use or disposition authorized by or pursuant
14 to section 392 of this title with respect to such entity, and
15 any deposit, withdrawal or use of funds authorized by or pur-
16 suant to section 393 of this title with respect to such entity—

17 “(1) shall be carried out in accordance with pre-
18 vailing commercial practices, consistent with the pro-
19 tection of intelligence sources, methods, and activities
20 from unauthorized disclosures; and

21 “(2) shall not be subject to any Federal statute
22 (other than this chapter, title V of the National Securi-
23 ty Act of 1947, and the War Powers Resolution) appli-
24 cable to Federal appropriations, Federal receipt and
25 use of funds other than appropriated funds, Federal ac-

1 acquisitions, Federal property management, Federal serv-
2 ices management, Federal information management,
3 Federal tort claims, Federal employment of Federal
4 Government corporations if, and to the extent that, the
5 Secretary of Defense certifies in writing that compli-
6 ance with such statute would be inconsistent with the
7 protection of intelligence sources, methods, and activi-
8 ties from unauthorized disclosure.

9 "§ 395. Limitations on activities of intelligence commer-
10 cial entities

11 "(a) Nothing in this chapter shall be deemed to consti-
12 tute authority for the conduct of intelligence activities (other
13 than those expressly authorized by this chapter) which are
14 not otherwise authorized by or pursuant to law.

15 "(b) A commercial entity authorized under section 391
16 of this title, and the personnel thereof, shall not engage in
17 intelligence activities within the United States, except—

18 "(1) training;

19 "(2) administration; and

20 "(3) recruitment of individuals who are not United
21 States persons to serve subsequently as intelligence
22 sources outside the United States in foreign intelli-
23 gence collection activities.

24 "(c) No commercial entity authorized under section 391
25 of this title may have as its overt activity communications

1 media activity, religious activity, or traffic in arms or
2 security-related services.

3 “(d) No United States person may be employed by, or
4 assigned or detailed to, a commercial entity authorized under
5 section 391 of this title who has not been informed that such
6 entity is an entity of the United States Government engaged
7 in intelligence activities.

8 "§ 396. Executive branch oversight, accountability, and
9 coordination

10 “(a)(1) The Secretary of Defense, after consultation
11 with the Attorney General and the Director of Central Intel-
12 ligence, shall issue such regulations as may be necessary to
13 implement this chapter.

14 “(2) The regulations issued by the Secretary of Defense
15 under this section shall include provisions to ensure—

16 “(A) centralized, effective departmental oversight
17 of the use of authority granted by or pursuant to this
18 chapter;

19 “(B) effective management, operational, security,
20 legal, and accounting controls in the use of such au-
21 thority;

22 “(C) coordination of the activities of commercial
23 entities authorized under section 391 of this title with
24 the Department of State, the Federal Bureau of Inves-
25 tigation, and the Central Intelligence Agency; and

1 “(D) compliance with this chapter, title V of the
2 National Security Act of 1947, and the War Powers
3 Resolution.

4 “(b) The inspector general of the Department of De-
5 fense shall conduct at least annually a program and oper-
6 ations review and evaluation and a financial audit of activities
7 undertaken pursuant to this chapter, including the establish-
8 ment, operation, and termination of commercial entities, and
9 shall report thereon to the Secretary of Defense, the Perma-
10 nent Select Committee on Intelligence of the House of Rep-
11 resentatives, and the Select Committee on Intelligence of the
12 Senate.

13 “§ 397. Relationship to laws of the several States

14 “(a) Commercial entities authorized under section 391
15 of this title are entities of the United States Government.

16 “(b) Commercial entities authorized under section 391
17 of this title, which are incorporated in, registered in, doing
18 business in, or otherwise have contacts with a State, terri-
19 tory, commonwealth or possession of the United States—

20 “(1) shall not be subject to the laws thereof, nor
21 to the jurisdiction of the courts thereof; and

22 “(2) may engage in conduct which appears to
23 comply with the laws thereof relating to accounting,
24 banking, contracts, employment, finance, incorporation,
25 registration, taxation, tort liability, and other regula-

1 tion of commercial activities as if the entity were sub-
2 ject to such laws, and may engage in conduct which
3 appears to submit to the jurisdiction of the courts
4 thereof as if the entity were subject to such jurisdic-
5 tion, if the Secretary of Defense certifies in writing
6 that doing so is necessary to protect intelligence
7 sources, methods, and activities from unauthorized dis-
8 closure or is necessary in the interest of justice.

9 **“§ 398. Delegation of authority**

10 “Notwithstanding subsection 133(d) of this title, the
11 Secretary of Defense may delegate his authority, functions
12 and duties under subsections 391(a), 394(2), 396(a), and
13 397(b) of this title only to the Deputy Secretary of Defense.

14 **§ 399. Definitions**

15 “In this chapter—

16 “(1) ‘commercial entity’ means a corporation,
17 foundation, company, firm, partnership, association, so-
18 ciety, joint venture, sole proprietorship, or other legal
19 entity which is nongovernmental in appearance, within
20 or outside the United States, established and operated
21 solely to conceal foreign intelligence collection activi-
22 ties under cover of its overt function;

23 “(2) ‘foreign intelligence collection activities’
24 means the collection of foreign intelligence or counter-
25 intelligence information by a component of the Depart-

1 ment of Defense or the armed forces, and related sup-
2 port activities;

3 “(3) ‘intelligence activities’ means the collection of
4 foreign intelligence or counterintelligence information,
5 the conduct of counterintelligence operations, the con-
6 duct of covert action, related support activities, and
7 any other intelligence or intelligence-related activity of
8 the United States Government; and

9 “(4) ‘United States person’ means a citizen of the
10 United States or an alien admitted to permanent resi-
11 dence in the United States.”.

12 (b) The tables of chapters at the beginning of subtitle A
13 of such title, and at the beginning of part I of such subtitle,
14 are each amended by inserting after the item relating to
15 chapter 18 the following new item:

“19. Department of Defense Intelligence Commercial Entities.. 391”.

16 SEC. 3. The amendments made by this Act to title 10,
17 United States Code shall take effect ninety days after the
18 date of enactment of this Act.

○

entitled "Department of Defense Intelligence Commercial Entities," in part 1 of Subtitle A of title 10, United States Code, and makes conforming amendments to tables of chapters in title 10. Section 3 provides that the amendments made by the legislation to title 10 take effect ninety days after enactment of the legislation.

The provisions of chapter 19 of title 10 enacted by Section 2 of the bill are explained below:

Section 391

Subsection 391(a)(1) grants to the Secretary of Defense the authority, with the concurrence of the Attorney General and the Director of Central Intelligence, to establish and operate commercial entities to provide cover for foreign intelligence collection activities of the Department of Defense.

The requirement for the concurrence of the Attorney General ensures an independent high-level legal review of plans for establishment and operation of a DOD intelligence commercial entity, and ensures the harmony of the plans with the intelligence, counterintelligence, and law enforcement functions of components of the Department of Justice. The requirement for the concurrence of the Director of Central Intelligence ensures that the plans will be consistent with national intelligence needs and ensures the harmony of the plans with the intelligence, counterintelligence and special activities of other elements of the United States Intelligence Community.

To exercise his authority to establish a commercial entity, the Secretary of Defense must certify in writing that establishment and operation of that entity is essential to the conduct of an authorized foreign intelligence collection activity of the Department of Defense. Thus, the Secretary may authorize establishment of a commercial entity only when no reasonable and effective alternative method exists for carrying out an authorized DOD foreign intelligence collection activity.

The Secretary may initially authorize the establishment and operation of a commercial entity for any period not to exceed two years.

Subsection 391(a)(2) permits the Secretary of Defense to renew the authority to operate a commercial entity at the expiration of the previous period for which he has authorized its operation. The renewal requires the concurrence of the Attorney General and the Director of Central Intelligence and the written certification of the Secretary of Defense that the operation of the entity is essential to the conduct of an authorized foreign intelligence collection activity of the Department of Defense. The Secretary may renew the authority to operate the commercial entity for any period not to exceed two years. The number of successive periods for which operation of the commercial entity may be authorized is not limited.

Subsection (b) provides that the Secretary of Defense may terminate a commercial entity at any time. His authority to terminate a commercial entity is not conditioned upon any concurrence or certification.

Section 392

Section 392 grants to the Secretary of Defense authority to acquire, use and dispose of items needed in the establishment, operation and termination of DOD intelligence commercial entities. The broad authority granted ensures that the Secretary can provide the necessary administrative support for such commercial entities.

In addition to requiring administrative support common to any governmental organization, such as workspace, equipment, and

DEFENSE INTELLIGENCE COMMERCIAL ENTITIES ACT

HON. G. WILLIAM WHITEHURST

OF VIRGINIA

IN THE HOUSE OF REPRESENTATIVES

Thursday, December 19, 1985

Mr. WHITEHURST. Mr. Speaker, on December 16, 1985, I introduced H.R. 3963, the Defense Intelligence Commercial Entities Act. To assist those who review the legislation, I am inserting the section-by-section explanation of the legislation in the CONGRESSIONAL RECORD:

DEFENSE INTELLIGENCE COMMERCIAL ENTITIES ACT

SECTION-BY-SECTION EXPLANATION

The bill consists of three sections. Section 1 provides that the short title of the Act is the "Defense Intelligence Commercial Entities Act." Section 2 enacts a new chapter 19,

entity will require special administrative support due to its commercial functions and appearance. Thus, for example, the entity may require private legal services, commercial, and occupational licenses from a State or foreign government, private liability insurance, and private banking services. Section 392 ensures that the Secretary of Defense can meet the administrative support needs of a defense intelligence commercial entity, including its unusual needs stemming from its ostensibly commercial status.

The authority granted by Section 392 is independent of, and in addition to, any other acquisition, use or disposal authority which the Secretary of Defense possesses.

Section 393

Section 393 ensures that the handling and use of funds in connection with defense intelligence commercial entities will be consistent with the ostensible commercial status of those entities. Section 393 displaces several limitations contained in Section 3302 of title 31, United States Code, on governmental use of funds. Observance of the limitations contained in Section 3302 of title 31 would be inconsistent with the ostensible commercial status of defense intelligence commercial entities.

Subsection 393 (a) permits the Secretary of Defense to establish and maintain commercial banking accounts in the establishment, operation, and termination of defense intelligence commercial entities. The authority to use commercial banking services applies both with respect to appropriated funds used in connection with a defense intelligence commercial entity and with respect to funds generated by the commercial activities of that entity.

Subsection 393 (b) permits use of funds generated by the commercial activities of a defense intelligence commercial entity to offset the necessary and reasonable expenses incurred by that entity. The funds generated by a particularly entity may only be used to offset the expenses of that particular entity.

Subsection 393 (c) provides that funds generated by a defense intelligence commercial entity that are no longer needed for the conduct of the activities of that entity shall be remitted to the Treasury as miscellaneous receipts.

Subsection 393 (d) provides for the disposition of the proceeds generated by termination of a defense intelligence commercial entity. After all outstanding obligations of the entity are met, the remaining proceeds revert to the Treasury.

Section 394

Section 394 provides that the establishment, operation, and termination of a defense intelligence commercial entity; any acquisition, use or disposition with respect to such entity; and any deposit, withdrawal or use of funds with respect to such entity, will be carried out in accordance with prevailing commercial practices, consistent with the protection of intelligence sources methods and activities from unauthorized disclosure, and without regard to certain requirements of federal statutes.

To maintain its usefulness as a cover for foreign intelligence collection activities, a defense intelligence commercial entity must maintain commercial credibility. The entity must appear to anyone who scrutinizes it to be a bona fide commercial entity, rather than an entity of the United States Government. Accordingly, the entity must conduct all aspects of its activities in the same manner as would a private sector commercial entity. Circumstances may arise, however, in which observing prevailing commercial practices would not be consistent with

ods or activities from unauthorized disclosure, and in such cases prevailing commercial practices would not be observed.

The section grants extraordinary authority to waive the applicability of requirements in a broad spectrum of federal statutes to the extent necessary to protect intelligence sources, methods and activities from unauthorized disclosure. Without the waiver authority, a defense intelligence commercial entity would be obliged to observe federal statutes that normally apply to U.S. Government entities but do not apply to a bona fide commercial entity. Such inconsistency between the conduct of an entity and its ostensible status might reveal to an interested observer that the entity is not what it claims to be, risking the compromise of commercial cover and of the intelligence activities conducted by the entity.

A federal statute within one of the enumerated categories (federal appropriations, federal receipt and use of funds other than appropriated funds, federal acquisitions, federal property management, federal services management, federal information management, federal tort claims, federal employment or federal government corporations) ceases to apply if, and to the extent that, the Secretary of Defense certifies that compliance with the statute would be inconsistent with the protection of intelligence sources, methods and activities from unauthorized disclosure. The section provides that a statute is waived only to the extent that compliance would be inconsistent with such protection. Thus, the Secretary's authority extends not to blanket waiver of the applicability of the statute, but only to the waiver of the applicability of the particular requirements of that statute which would be inconsistent with the protection of intelligence sources, methods and activities from unauthorized disclosure (which may in some circumstances amount to waiver of the applicability of the entire statute).

The section makes clear that the Secretary's waiver authority does not apply with respect to the chapter enacted by this legislation (chapter 19 of title 10, United States Code), Title V of the National Security Act of 1947 (which relates to congressional oversight of intelligence activities) and the War Powers Resolution. Thus, nothing in the statute in any way limits the role of the Congress in oversight of intelligence activities and military activities.

Section 395

Subsection 395(a) makes clear that the chapter enacted by the legislation (chapter 19 of title 10, United States Code) provides authority only for establishment and use of commercial entities as cover for DOD foreign intelligence collection activities, and does not provide the authority for those underlying foreign intelligence collection activities.

Subsection 395(b) establishes clear limitations on the activities of defense intelligence commercial entities and their personnel within the United States. They may engage within the United States only in (1) training, (2) administration, and (3) recruitment of non-U.S. persons to serve outside the United States as intelligence sources. Administration includes the full range of support activities necessary to establish, operate and terminate a commercial entity, such as finance, logistics, and procurement, which may be performed by establishment and operation within the United States of defense intelligence commercial entities solely to provide such support. The subsection ensures that the activities of defense intelligence commercial entities will have a

foreign focus and will not be used to conduct domestic intelligence activities.

Subsection 395(c) provides that no defense intelligence commercial entity may have as its overt activity communications media activity, religious activity, or traffic in arms or security-related services.

The prohibition against establishing a defense intelligence commercial entity to engage in communications media activity protects against the possibility of media activity by such an entity having an accidental or intentional effect on the domestic political processes of the United States. The prohibition prevents establishment of defense intelligence commercial entities to engage in radio broadcasting, television broadcasting, newspaper publishing, book or magazine publishing, wire services and similar activities. The prohibition against the overt activity of a defense intelligence commercial entity being communications media activity does not prevent incidental commercial use of communications media by such an entity if prevailing commercial practices so require. Thus, for example, if a defense intelligence commercial entity is engaged in a cover business of a type in which one would normally place commercial advertisements or solicitations in a local newspaper, the entity may do so.

The prohibition against establishing a defense intelligence commercial entity to engage in religious activity protects the integrity of religious freedom and religious institutions.

The prohibition against establishing a defense intelligence commercial entity to engage in traffic in arms or security-related services prevents the possibility of using defense intelligence commercial entities to circumvent United States arms transfer policies or to implement those policies. The Arms Export Control Act, the Foreign Assistance Act, and the statutory mechanisms for covert arms transfers govern the transfer of arms and defense services. The prohibition does not in any way prohibit the personnel of a defense intelligence commercial entity from defending themselves, nor does it prevent the use of such personnel on detached duty in military operations, consistent with the War Powers Resolution.

Subsection 395(d) requires that every U.S. person employed by, or assigned or detailed to, a defense intelligence commercial entity be informed prior to employment, assignment or detail that the entity as an entity of the United States Government engaged in intelligence activities. The provision thus prohibits unwitting employment, assignment or detail of United States persons.

Section 396

Subsection 396(a) authorizes and directs the Secretary of Defense, after consultation with the Attorney General and the Director of Central Intelligence, to issue regulations to implement the legislation, and specifies a number of requirements which those regulations must satisfy.

The Secretary's regulations must provide for effective centralized Department of Defense oversight of activities related to defense intelligence commercial entities. The requirement for centralization of the internal oversight role promotes consistency among DOD components in establishing policies and practices involving defense intelligence commercial entities and also facilitates oversight of defense intelligence commercial activities by non-DOD entities, such as the Congress. The requirement that the internal oversight role occur at the departmental level, rather than at the lower level of individual DOD components, ensures appropriate high-level attention

within the Department of Defense to any problems which may come to light in the course of internal oversight activities.

The Secretary's regulations must provide effective management, operational, security, legal, and accounting controls for all matters relating to defense intelligence commercial entities. The Secretary's careful design and establishment of strict controls will be of critical importance, especially given that such controls often will replace statutory controls which the legislation authorizes the Secretary to waive in certain circumstances.

The Secretary's regulations must provide for coordination of defense intelligence commercial entity activities with the Department of State, the Federal Bureau of Investigation, and the Central Intelligence Agency.

The Secretary's regulations must ensure compliance with the chapter enacted by the legislation (chapter 19 title 10, United States Code), Title V of the National Security Act of 1947 (relating to congressional oversight of intelligence activities), and the War Powers Resolution.

Subsection 396(b) authorizes and directs the Department of Defense Inspector General to conduct, at least annually, a program and operations review and evaluation and a financial audit of all activities relating to defense intelligence commercial entities and to report thereon to the Secretary of Defense and the intelligence committee of the Congress.

Section 397

Subsection 397(a) provides that defense intelligence commercial entities are entities of the United States Government. As such, defense intelligence commercial entities will enjoy within the constitutional scheme any immunities and privileges enjoyed by the other federal entities. Thus, for example, the sovereign immunity of the United States Government to suit, to the extent not otherwise waived by statute, will extend to defense intelligence commercial entities.

Subsection 397(b) explicitly preempts the applicability of State laws to, and the jurisdiction of State courts over, defense intelligence commercial entities. Thus, defense intelligence commercial entities will be subject exclusively to federal law. Subsection 397(b) provides that, although defense intelligence commercial entities are not subject to State laws and State court jurisdiction, they may engage in conduct which appears to comply with State laws and State court jurisdiction if the Secretary of Defense determines that doing so is necessary to protect intelligence sources, methods and activities from unauthorized disclosure or is necessary in the interests of justice.

Under the authority granted in subsection 397(b), with the appropriate certification, a defense intelligence commercial entity may engage in conduct which appears to comply with State laws in the same manner as would a bona fide commercial entity. Thus, for example, if the Secretary of Defense certifies that protection of intelligence sources, methods and activities requires doing so, he might authorize a defense intelligence commercial entity to incorporate within a particular State, even though that State's incorporation laws do not provide for incorporation by federal entities. Similarly, even though federal agencies are not subject to State taxation, the Secretary of Defense, based upon the appropriate certification, may authorize the entity to file State tax returns and remit State taxes.

Also, under the authority granted in subsection 397(b), a defense intelligence commercial entity may engage in conduct which appears to submit to State court jurisdiction

in the same manner as would a bona fide commercial entity. Thus, for example, if the Secretary of Defense certifies that protection of intelligence sources, methods and activities or the interests of justice require doing so, he might authorize a defense intelligence commercial entity to participate in a lawsuit in a State court based on breach of a commercial contract in the same manner as would a bona fide commercial entity.

The Department of Defense may well make substantial use of the authority to authorize defense intelligence commercial entities to engage in conduct appearing to comply with State commercial laws, since it may become the Department's practice to establish such entities by incorporation or registration under the laws of the several States. In contrast, the Department should only rarely need to use the authority to authorize defense intelligence commercial entities to engage in conduct appearing to submit to the jurisdiction of a State court, as the authorized activities of such entities within the United States are quite restricted, and thus are not likely to give rise to many situations in which submission to State court jurisdiction would be appropriate.

Section 398 provides that the Secretary of Defense may delegate only to the Deputy Secretary of Defense the Secretary's authority, functions and duties under subsections 391(a), 394(b), 396(a) and 397(b) of title 10, United States Code, as enacted by this legislation. By requiring the Secretary or Deputy Secretary of Defense to exercise the authority, duties, and functions set forth in these subsections, the legislation ensures high-level attention to sensitive decisions involving defense intelligence commercial entities.

Under Section 398, the Secretary of Defense may delegate only to the Deputy Secretary of Defense the authority to authorize and renew authorization for the establishment and operation of defense intelligence commercial entities based upon the requisite certification (§ 391(a)); the authority to waive the applicability of certain federal statutes based upon the requisite certification (§ 394(2)); the authority to issue implementing regulations (§ 396(a)); and the authority to authorize defense intelligence commercial entities to appear to comply with State commercial laws and court jurisdiction to which they are not subject. Authorities, duties and functions provided in the legislation, other than in the subsections specifically cited by Section 398, are subject to delegation in accordance with subsection 133(d) of title 10, United States Code.

The limitation on delegation of certain specified authorities, duties and functions will not place an inordinate administrative burden on the Secretary and Deputy Secretary. Exercise of the authority to authorize establishment and operation of a commercial entity will occur only once for each entity, and subsequent renewals to operate will occur only occasionally. Exercise of the authority to waive various federal statutory requirements applicable to an entity, to authorize apparent compliance with State statutes, and to authorize apparent submission to State court jurisdiction, will often accompany the authorization to establish and operate the entity, although changes may be necessary with respect to an entity from time to time. Exercise of the authority to issue implementing regulations should occur once, with changes to such regulations thereafter occurring only occasionally, as experience demands. The greatest burden upon the Secretary and Deputy Secretary will thus occur at the time of creation of a defense intelligence commercial entity,

when the nature and scope of its activities and the legal regime governing it are established. Cabinet-level involvement in decisions of such sensitivity at that time is appropriate.

Section 399

Section 399 defines the terms "commercial entity," "foreign intelligence collection activities," "intelligence activities," and "United States person" used in the new chapter 19 of title 10, United States Code, enacted by the legislation.

The definition of "commercial entity" comprehends all forms of non-governmental legal entities, within or outside the United States, established and operated solely to conceal DOD foreign intelligence collection activities under cover of its overt function. The definition makes clear that the legislation authorizes establishment of DOD commercial entities only to provide cover for DOD foreign intelligence collection activities. The legislation does not authorize establishment of such entities to engage in any intelligence activities other than foreign intelligence collection activities, nor to provide cover for any intelligence activities other than foreign intelligence collection activities. Thus, for example, DOD may not establish such entities to engage in the conduct of, or to provide cover for, counterintelligence operations (as distinguished from the collection of counterintelligence information) or covert action. The term "commercial entity" is used throughout the legislation.

The definition of "foreign intelligence collection activities" comprehends only collection by the Department of Defense or the armed forces of foreign intelligence or counterintelligence information, and related support activities. It does not include any other types of intelligence activities, such as counterintelligence operations or covert action. The legislation authorizes the establishment of defense intelligence commercial entities only to provide cover for "foreign intelligence collection activities." The term "foreign intelligence collection activities" is used in Sections 391, 395, and 399.

The definition of "intelligence activities" comprehends all intelligence and intelligence-related activities of the United States Government. The term "intelligence activities" is used in Section 395.

The term "United States person" means only citizens of the United States and aliens admitted to permanent residence in the United States. The term "United States person" is used in Sections 395 and 399.

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TO #13: Please prepare an appropriate response.

3637 (10-81)

14 Mar 86

Date